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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

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**No. 81**

**LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUCKER, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, KILLA MCINTYRE AND RUTH Mc  
INTYRE**

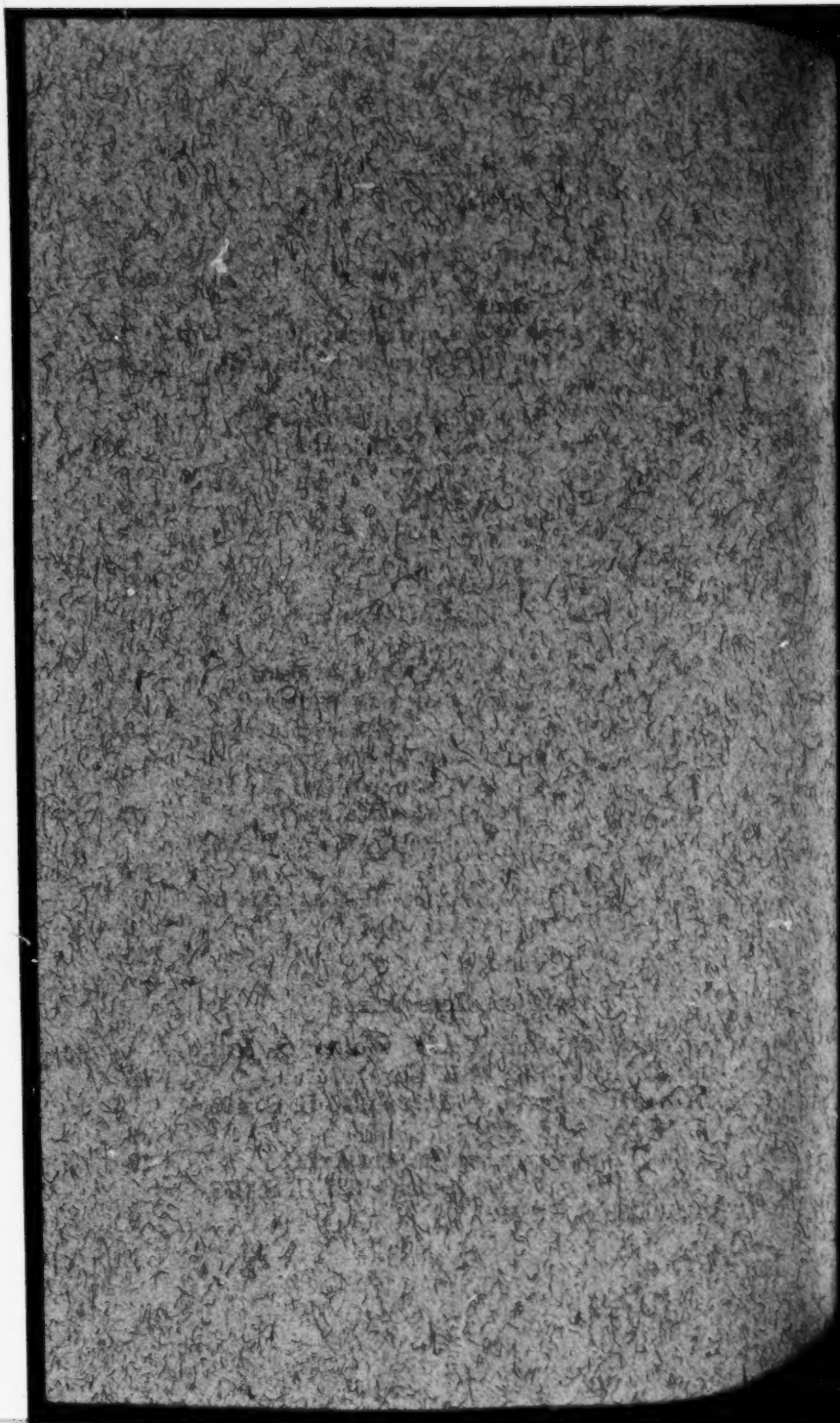
*Petitioners,*

**LUTHER THOMPSON AND H. T. PATTON, EXECUTORS OF  
THE ESTATE OF DR. S. A. THOMPSON, DECEASED**

*Respondents.*

**PETITION FOR WRIT OF HABEAS CORPUS TO THE  
SUPREME COURT OF ARKANSAS, AND BRIEF IN  
SUPPORT THEREOF**

**C. M. MARTIN,  
HENRY B. WHITLEY,  
J. R. WILSON,  
Counsel for Petitioners.**



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No. 853

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LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUKES, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, RILLA MCINTYRE AND RUTH MC-  
INTYRE *Petitioners,*

*vs.*

LUTHER THOMPSON AND H. T. PATTON, EXECUTOR OF  
THE ESTATE OF DR. S. A. THOMPSON, DECEASED,  
*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI**

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MAY IT PLEASE THE COURT:

The petition of Lide Thompson, Mattie Thompson, Mary Tukes, Vera Thompson, Jim Thompson, Aline Utsey, Rilla McIntyre and Ruth McIntyre respectfully shows to this Honorable Court:

(A)

**Summary Statement of the Matter Involved**

William Thompson, a negro, who resided in Ouachita County, Arkansas, departed this life intestate on or about May 1st, 1933, and there survived him seven children, to-wit: Luther Thompson, Jim Thompson, Lide Thompson, Dave

Thompson, Della (Rilla) Tukes (R. 38). Luther Thompson, a son, one of the respondents herein was appointed Administrator of the Estate of William Thompson, Deceased (R. 40). S. A. Thompson, hereinafter referred to as Dr. S. A. Thompson, and Roy Smith were sureties on the Administrator's bond (R. 39). Luther Thompson, the Administrator, filed his inventory on August 27, 1934 (R. 41), and the inventory was approved by the Probate Court on Ouachita County, Arkansas, on August 30, 1934 (R. 44).

After the appointment of Luther Thompson as Administrator, there was paid to him as such Administrator, the sum of \$250.00 as rent from some of the lands of the estate (R. 6), making a total of \$996.39 worth of personal property, \$544.39 of which was cash or bank deposits, that was charged to the Administrator, and for which he was accountable (R. 6 & 41).

"Three claims were filed against the estate. Stephens Drug Co. filed its claim in the sum of \$54.35, but the claim was allowed in the sum of \$43.48 (R. 41). Dr. S. A. Thompson, the surety, filed his claim on an account in the sum of \$558.42. Both of the above claims were filed and allowed within the statutory period of non-claim."

Smith Bros. & Co., of which Roy Smith, the surety, was Vice President and General Manager, filed its claim on April 28, 1936 (R. 36), in the amount of \$250.00, which claim was allowed in that amount on that date (R. 45). The filing and allowance of such claim was long after the running of the statute of non-claim.

On the 27th day of June, 1936, the Probate Court of Ouachita County, Arkansas, entered its order, directing a sale of the 320 acres of land owned by William Thompson at his death, in order to pay the claims of Dr. S. A. Thompson and Smith Bros. & Co. (R. 46). The Administrator had never accounted for any part of the personal property, except the sum of \$43.48 (R. 47), which he had paid to the Stephens Drug Co. in satisfaction of its claim. The 320

acres of land was sold to Dr. S. A. Thompson, the surety, on the Administrator's bond, and claimant against the estate, for the sum of \$1,075.00 (R. 48). The sale was purportedly approved on the 27th day of July, 1936, and the Administrator's deed was executed and delivered to Dr. S. A. Thompson on that date (R. 48).

The Administrator on October 27, 1936, filed his first and final settlement, accounting only for the proceeds of the sale of the 320 acres of land (R. 50). On January 20, 1937, the Probate Court, Ouachita County, Arkansas, approved the first and final settlement of the Administrator (R. 51). There was never, at any time, an accounting for the personal property, except the sum of \$43.48.

July 25, 1941, petitioners herein filed their complaint in the Probate Court of Ouachita County, Arkansas, seeking to set aside the purported sale of the 320 acres of land under the orders of the Probate Court, above mentioned, and an accounting from the Administrator and his sureties (R. 5). The cause of action was based upon the fraud that was practiced upon the Court in procuring the order to sell the land when the personal estate was sufficient to pay all claims and upon the proposition that the Probate Court of Ouachita County, Arkansas, was without jurisdiction to order the land sold and its orders and judgments were null and void for that reason (R. 5).

After considerable delay the Probate Court of Ouachita County, Arkansas, sustained a motion to dismiss the cause of action for want of jurisdiction on November 23, 1946; however, the Probate Court also entered a finding and judgment of dismissal barring petitioners upon the merits of the cause of action (R. 22).

The death of Dr. S. A. Thompson occurred on November 24, 1946, but the cause was properly revived in the name of the executor, respondent herein (R. 24). Petitioners sought and obtained leave to file amended and substituted



complaint (R. 25). The amended and substituted complaint raised the question that petitioners were deprived of their property without due process of law (R. 25). The amended and substituted complaint was likewise dismissed for want of jurisdiction and because it was subject to the same objection as the original complaint (R. 32).

Upon the appeal the Supreme Court of Arkansas affirmed the orders and judgments of the Probate Court in all things (R. 55), and further held that the Probate Court correctly exercised its discretion in dismissing the cause of action (R. 52).

(B)

**Reason Relied Upon For the Allowance of the Writ**

1. Upon the death of William Thompson title to the 320 acres of land vested in his descendants, his children, subject to be divested by the order of the Probate Court, if need be, to pay debts of the estate.

2. The approval of the inventory by the Probate Court gave it the effect of being *prima facie* correct, subject to be overcome by competent evidence.

3. The order and judgment ordering a sale of the 320 acres of land for the purpose of paying the debts of the estate capriciously and arbitrarily disregarded the *prima facie* effect of the inventory and approval thereof and the statute thereon.

4. The orders and judgments of the Probate Court of Ouachita County, Arkansas, for a sale of the 320 acres of land, deprives petitioners of their property without due process of law, in that petitioners are denied the benefits and the application of the Statute making the inventory *prima facie* correct and the said Court was without jurisdiction to enter the orders for the sale of the land when the



inventory showed there was sufficient personal assets to pay all the debts of the estate.

5. The filing and allowance of the claim of Smith Bros. & Co. after it was barred by the Statute of non-claim deprived petitioners of the benefits of the non-claim statute.

6. If the Probate Court of Ouachita County, Arkansas, was without jurisdiction, any judgment on the merits barring petitioners is capricious and arbitrary.

7. If the Probate Court of Ouachita County, Arkansas, had jurisdiction, any judgment on the merits, or contrary to the pleadings is capricious and arbitrary, without evidence upon which to base such judgment.

8. If the Probate Court of Ouachita County, Arkansas, was without jurisdiction of the cause of action, it had no discretion and could exercise no discretion; if the said Probate Court had jurisdiction, its dismissal of the cause of action was a capricious and arbitrary exercise of discretion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8291, Lide Thompson, et al., Appellants, vs. Luther Thompson, et al., Appellees, and that the said judgment of the Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

LIDE THOMPSON,	MARY TUKES,
MATTIE THOMPSON,	ALINE UTSEY,
VERA THOMPSON,	RILLA MCINTYRE,
JIM THOMPSON,	RUTH MCINTYRE,

By C. M. MARTIN,  
HENRY B. WHITLEY,  
J. R. WILSON,  
*Attorneys for Petitioners;*  
By J. R. WILSON.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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**No. 853**

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LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUKES, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, RILLA McINTYRE AND RUTH Mc-  
INTYRE,

*Petitioners,*

*vs.*

LUTHER THOMPSON AND H. T. PATTON, EXECUTORS  
OF THE ESTATE OF DR. S. A. THOMPSON, DECEASED,

*Respondents*

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI**

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**I**

**The Opinions of the Courts Below**

The opinion of the Supreme Court of Arkansas has not been officially reported at this time. The opinion was dated January 19th, 1948 (R. 52).

## II

**Jurisdiction**

1. Petition for re-hearing was denied by the Supreme Court of Arkansas on March 8th, 1948 (R. 60).

2. Petitioners, by amended and substituted complaint, filed on January 15, 1947, in the Ouachita Probate Court, with the Court's permission set forth a claim that the judgment or orders of the Court deprived said petitioners of their property without due process of Law as provided by the 14th Amendment to the Constitution of the United States (R. 29). Petitioners by a petition for a re-hearing, filed in the Supreme Court of Arkansas in due time, claimed that they had been deprived of their property without due process of Law, in that their land was sold for the alleged purpose of paying debts of the estate when there was sufficient personal property to pay all claims (R. 58). Petitioners also in the petition for re-hearing in the Supreme Court of Arkansas, claimed that the action of said Court in holding that the Court below correctly exercised its discretion in the matter deprived the petitioners of their property without due process of Law (R. 58). The petition for re-hearing further claimed that Petitioners were denied due process of law by the action of the Court below, and the affirmance thereof by the Supreme Court of Arkansas, in finding that petitioners were barred on the merits of the controversy without evidence before the Court upon which to base such findings and by the presumption indulged in contrary to the facts reflected by the record and alleged in the pleadings (R. 59). The claim made in the amended and substituted complaint was passed by the lower Court without comment (R. 32). The claim made in the amended and substituted complaint was passed by the Supreme Court of Arkansas without comment (R. 52). The petition for

re-hearing in which the Federal questions were raised was denied and overruled without comment on March 8th, 1948 (R. 60).

3. Jurisdiction of this Court is invoked under the authority of Section 237 of the Judicial Code as amended, Sub-Paragraph (b) on the ground that there is specially set up and claimed by Petitioners a right, titled or privileged under the Constitution of the United States as set forth in the 14th Amendment thereof.

4. It is believed that the following cases sustain the jurisdiction of this Court:

*Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567;

*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064;

*Home Teleph. Teleg. Co. v. Los Angeles*, 227 U. S. 278, 57 L. Ed. 510, 33 S. Ct. 312;

*Cuyahoga River Power Co. v. Akron*, 240 U. S. 462, 60 L. Ed. 743, 36 S. Ct. 402;

*Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265.

### III

#### Statement of the Case

NOTE: A full statement of the case has been given under heading "A" in the Petition for Writ of Certiorari herein, and in the interest of brevity, the statement will not be repeated under this point.

### IV

#### Specification of Errors

1. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas, erred in not finding

and holding that said Probate Court was without jurisdiction to order Petitioners' land sold for the purpose of paying the debts of the Estate of William Thompson, Deceased, when there was sufficient personal assets to discharge all obligations.

2. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas erred in not finding and holding that the inventory approved by the said Probate Court *prima facie* showed that there was sufficient personal assets to pay all obligations of the estate.

3. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas erred in finding and holding that Petitioners were barred on the merits of the controversy without any evidence to sustain such finding and holding, and in contradiction of the pleadings and the record.

4. The Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas erred in making any finding or entering any holding on the merits of the controversy, if the said Probate Court was without jurisdiction of the cause of action.

5. The Supreme Court of Arkansas erred in finding and holding that the Probate Court of Ouachita County, Arkansas, correctly exercised its discretion in dismissing Petitioners' cause of action.

**ARGUMENT****Summary of Argument**

POINT A. UPON THE DEATH OF WILLIAM THOMPSON, TITLE TO ALL OF HIS REAL ESTATE DESCENDED TO AND VESTED IN HIS HEIRS AT LAW, SUBJECT TO BE DIVESTED OUT OF THEM, IF NEED BE, TO PAY THE DEBTS OF THE ESTATE.

POINT B. THE FILING OF THE INVENTORY BY THE ADMINISTRATOR, TOGETHER WITH THE SHOWING THAT ADDITIONAL PERSONAL ASSETS CAME TO HIS HANDS AS ADMINISTRATOR, MADE A PRIMA FACIE SHOWING THAT THERE WAS SUFFICIENT PERSONAL ASSETS TO PAY ALL OBLIGATIONS OF THE ESTATE, AND UNTIL PROPER DISPOSITION WAS MADE OF THE PERSONAL ASSETS, THE PROBATE COURT WAS WITHOUT JURISDICTION TO ORDER A SALE OF THE REAL ESTATE TO PAY THE DEBTS OF THE ESTATE.

POINT C. THE PROBATE COURT OF OUACHITA COUNTY, IN ORDERING THE LAND SOLD WITHOUT MAKING PROPER DISPOSITION OF THE PERSONAL PROPERTY, AS REQUIRED BY LAW, DEPRIVED PETITIONERS OF THE BENEFITS OF THE STATUTES OF ARKANSAS.

POINT D. UNDER THE 14<sup>TH</sup> AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AS A PART OF DUE PROCESS OF LAW, PETITIONERS ARE ENTITLED TO THE BENEFITS OF THE STATUTES OF THE STATE OF ARKANSAS.

POINT E. THE JUDGMENT DISMISSING PETITIONERS' COMPLAINT UPON THE MERITS OF THE CONTROVERSY, BY A COURT THAT WAS HELD TO LACK JURISDICTION OF THE CAUSE OF ACTION, DEPRIVED PETITIONERS OF THE RIGHTS GUARANTEED TO THEM BY THE 14<sup>TH</sup> AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT F. THE FINDING AND HOLDING BY THE SUPREME COURT OF ARKANSAS THAT THE PROBATE COURT OF OUACHITA COUNTY, ARKANSAS, CORRECTLY EXERCISED ITS DISCRETION DEPRIVED PETITIONERS OF DUE PROCESS OF LAW, UNLESS SAID PROBATE COURT WAS HELD TO HAVE JURISDICTION OF THE CAUSE OF ACTION; IF THE PROBATE COURT HAD JURISDICTION THE HOLDING OF THE SUPREME COURT OF ARKANSAS THAT THE PROBATE COURT CORRECTLY EXERCISED ITS DISCRETION IN DISMISSING PETITIONERS' CAUSE OF ACTION DEPRIVES PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, WITHOUT EVIDENCE UPON WHICH TO BASE THE ACTION OF COURT, AND IN CONTRADICTION OF THE PLEADINGS AND THE RECORD.



## POINT A

**Vesting of Title to the Real Estate**

The law of descent and distribution of the State of Arkansas (Section 4338 of Pope's Digest, the Laws of Arkansas) provided:

"When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of the debts and the widow's dower in the following manner:

"First: To children or their descendants, in equal parts. \* \* \*

\* \* \* \* \*

Therefore, upon the death of William Thompson, title to the three hundred twenty acres of land descended to, and vested in petitioners subject to the widow's dower and the payment of his debts. The order of the Probate Court directing a sale of the land found that there was no widow (R. 47).

Section 148 of Pope's Digest of the Laws of Arkansas provides that lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate. Section 149 of Pope's Digest of the Laws of Arkansas provides:

"\* \* \* If any person, being the owner of lands and tenements, die intestate and such \* \* \* intestate shall not have sufficient personal estate to pay his debts, it shall be the duty of the \* \* \* administrator to apply to the Court of Probate by petition, describing said lands and containing a true and just account of all the debts of the \* \* \* intestate

which shall come to his knowledge and the amount of the assets in his hands to pay such claim."

The Law of Arkansas provides that such petition shall be verified. Section 151 of Pope's Digest of the Laws of Arkansas provides:

"On the presentation of such petition to the Court accompanied by the appraisement and list of sale of the personal property of such estate, if the Court shall be satisfied that the personal estate is insufficient to pay the debts of such \* \* \* intestate, the Court shall order and direct the sale of such lands as are set forth in such petition, or as much thereof as in the opinion of the Court may be sufficient to pay the debts of the deceased."

Under the above quoted Statutes, the Supreme Court of Arkansas has ruled that lands are assets in the hands of an administrator only when personalty is insufficient to pay the debts of the Estate. *Doke v. Benton County Lbr. Co.*, 114 Ark. 1.

Therefore, under the Statutes of Arkansas and the decisions of the Supreme Court of Arkansas, jurisdiction of the Probate Court to order a sale of the real estate to pay debts did not exist if the personal estate was sufficient therefor.

#### POINT B

##### **The Effect of the Inventory**

Section 51 of Pope's Digest of the Laws of Arkansas provided for the filing of an inventory of the assets of the estate. The inventory was filed as required by the Statute. It showed personal assets \$771.39 (R. 41).

By Section 133 of Pope's Digest of the Laws of Arkansas, it is a duty of the Probate Court at each term thereof to examine all inventories filed since the last term of such Court to see that they have been made and filed according to

Law. The inventory was so examined and approved by an order of the Ouachita County, Arkansas Probate Court (R. 44).

By Section 62 of Pope's Digest of the Laws of Arkansas inventories and appraisements are recognized as *prima facie* correct but are not conclusive for or against an executor or administrator.

The complaint filed by petitioners on July 25, 1941, alleged the payment of \$225.00 in cash as rent from lands of the estate during the time prior to the administrator's procurement of the order for a sale of the land (R. 5). Therefore, at the time of entering the order of sale, the record showed that the administrator had in his possession \$996.39 worth of personal assets, more than one-half of which was cash or bank deposits. According to the statutes and decisions cited under Point A of this argument, the Probate Court of Ouachita County, Arkansas, was without jurisdiction to order a sale of the real estate.

#### POINT C

#### **Petitioners Are Deprived of the Benefits of the Arkansas Statutes**

In order for the Probate Court of Ouachita County, Arkansas, to reach the decision to, and order the sale of the real estate, it was necessary for that Court to ignore the commands of the State Laws, cited and discussed under Points A and B. That the Probate Court did so ignore the Statutes above referred to, is conclusively shown by the first and final settlement of the administrator (R. 50).

It was argued by respondents below that the property was of no value; however, that is answered conclusively by the approval of the inventory by the Probate Court, in which it was filed. The cash and bank deposits were of a fixed value. The settlement of the administrator (R. 50)

was his first settlement and his final settlement. It accounts only for the sum of \$1075.00, which was the exact sum received by the administrator for the 320 acres of land.

It is therefore clearly shown by the record that the personal assets were in the hands of the administrator at the time he petitioned for, and the Court granted, the order for a sale of the land. It is also clear that such could not have happened without ignoring the commands of the State Statutes.

#### POINT D

#### **As a Part of Due Process of Law, Petitioners Are Entitled to the Benefits of the State Statutes**

The principle here invoked is set forth in a decision of this Court in the case of *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265. In that case this Court held:

“Although the prohibition of the 14th Amendment has reference exclusively to action by the State as distinguished from action by private individuals, the rights thereby protected may be invaded by the acts of a State officer under color of State authority, even though he not only exceeded his authority, but also disregarded special commands of the State Law.”

In the above decision this Court said:

“• • • But the Iowa court, without denying the lack of power of the State to authorize the discrimination effected, holds that such discrimination does not violate the Federal Constitution because it resulted from the act of private individuals and not of the State. The prohibition of the 14th Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. Ed. 677, 669, 3 Am. Crim. Rep. 524; *United States v. Harris*, 106

U. S. 629, 639, 27 L. Ed. 290, 294, 1 S. Ct. 601. But acts done 'by virtue of a public position under a State Government . . . and in the name and for the State,' Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679, 3 Am. Crim. Rep. 547, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the State law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the Federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law. Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention. Compare *Montana Nat. Bank v. Yellowstone County*, 276 U. S. 499, 72 L. Ed. 673, 48 S. Ct. 331; *Carpenter v. Shaw*, 280 U. S. 363, 369, 74 L. Ed. 478, 482, 50 S. Ct. 212."

It is clear that the courts of Arkansas have completely ignored the commands of the State Law as set forth in the points above discussed. The 14th Amendment to the Constitution of the United States, it is well settled, applies to the action of the States. Under the authority of the above decision of this Court, the State may not ignore the commands of the State Law, acting through its Legislative or an administrative agent. The same rule applies to the action of the State, acting through its judiciary. Such was the holding by this Court in the case of *Brinker Hoff-Faris Trust and Savings Co. v. Walter O. Hill, Treasurer*, 281 U. S. 673, 74 L. Ed. 1107.

As pointed out in the Argument under the above points the judiciary of the State of Arkansas could not have deprived petitioners of their property without completely ignoring the commands of the State Statutes above men-

tioned. The application of the above mentioned State Statutes would have resulted in the payment of all obligations of the Estate out of the personal assets as was required by Law.

It is respectfully submitted that the instant case calls for an application by this Court of the principles announced in the case of *Iowa-Des Moines National Bank v. Bennett, supra*. The denial of the benefits of the State Statutes is so clear that it appears to petitioners nothing further need be said.

That the denial of the benefits of the State Statutes is the denial of due process of law under the 14th Amendment to the Constitution of the United States requires little argument, especially in view of the principles announced in the case of *Iowa-Des Moines National Bank v. Bennett, supra*.

#### - POINT E

#### **The Judgment on the Merits of Controversy**

Petitioners' cause of action in the Probate Court of Ouachita County, Arkansas, was dismissed upon the motion of respondents wherein it was alleged that the Probate Court was without jurisdiction of the cause of action (R. 13). However, the order and decree (R. 22), makes various findings on the merits of the controversy and denies plaintiff's (Petitioners) prayer for relief and dismisses the cause of action for want of jurisdiction at the cost of petitioners.

The suit was originally brought in the Probate Court of Ouachita County, Arkansas, based upon the provisions of the fourth sub-division of Section 8246 of Pope's Digest of the Laws of Arkansas. The pertinent provisions of that Statute being as follows:

"The Court in which a judgment or final order has been rendered or made shall have power after the ex-

piration of the term, to vacate or modify such judgment or order;

• • •

“Fourth. For fraud practiced by the successful party in the obtaining of the judgment or order.

• • •”

Petitioners are completely at a loss to understand how a Court can make a finding and enter a judgment upon a cause of action, of which, such Court has no jurisdiction. However, with all due respect to the Probate Court of Ouachita County, Arkansas, and the Supreme Court of Arkansas, it appears such has been done in dismissing petitioners' complaint. The judgment (R. 22) dismisses the cause of action for want of jurisdiction, and at the same time denies plaintiffs the relief sought.

It is elementary that a judicial determination of the issues by a Court of competent jurisdiction is essential to due process of law in civil proceedings of a judicial character. 16 C. J. S. 1241, Sec. 616.

The decision of the Supreme Court of Arkansas (R. 52) and the judgment entered by that Court (R. 55) affirms the judgment of the Probate Court in all things and finds that there was no error in the proceedings and judgment of the Probate Court. With due deference to the Supreme Court of Arkansas, petitioners are unable to rationalize the action of the Supreme Court of Arkansas, in affirming the judgment of the Probate Court in all things.

As the record now stands, Petitioners are barred from attempting further relief by the judgment of a Court that had no jurisdiction of the cause of action and such judgment has been affirmed by the Supreme Court of the State.

If petitioners are to be barred upon the merits of the controversy, such judgment or order barring their rights, should be by a Court that had jurisdiction of the cause of



action. It is urged that petitioners are at least entitled to relief from that part of the judgment of the Probate Court which bars them upon the merits of the controversy, which judgment was entered by a Court that lacked jurisdiction, without the benefit of evidence and contrary to the record.

Perhaps the situation reflected by the conflicting judgment and order could be clarified by this Court's reversing the decision of the Supreme Court of Arkansas with directions to that Court to determine whether the order and decree of the Probate Court would be affirmed on the grounds that the Probate Court was without jurisdiction or whether the judgment denying petitioners the relief sought was the ground for affirmance.

#### POINT F

##### **The Exercise of Discretion by the Probate Court**

The argument that if the Court was without jurisdiction of the cause of action, it was without jurisdiction to enter a judgment upon the merits, made under Point E, applies with equal force and effect to the holding of the Supreme Court of Arkansas that the Probate Court correctly exercised its discretion. The Probate Court being without jurisdiction was powerless to exercise discretion.

Assuming, however, that the Probate Court had jurisdiction of the cause of action, the action of the Probate Court in dismissing Petitioners' Complaint, after making findings without the benefit of evidence, and contrary to the record, deprives petitioners of that due process of Law guaranteed to them by the 14th Amendment to the Constitution of the United States.

With due respect for the Supreme Court of Arkansas, it is hard to understand how that Court could hold that the Court below correctly exercised discretion, when the record showed that petitioners had been denied the benefits

of the Statutes heretofore mentioned. It was surely fraud upon petitioners, either intentional or unintentional, to deprive them of their property without an application of the Statutes, which was for their benefit. It, therefore, appears that the action of the Probate Court was not a correct exercise of discretion, but when viewed in the light of the record, the record showed conclusively the denial of the benefits of the Statutes, and that appears to be an abuse of discretion, if the Probate Court was vested with jurisdiction of the cause.

This holding of the Honorable Supreme Court of Arkansas also bars petitioners of their rights to prosecute their cause of action.

### Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, in order that the judgment and decree of the Ouachita County, Arkansas, Probate Court and the decision and judgment of the Supreme Court of Arkansas may be corrected, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Supreme Court of Arkansas and finally reverse it.

Respectfully submitted.

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HENRY B. WHITLEY,  
*Magnolia, Arkansas.*

J. R. WILSON,  
*El Dorado, Arkansas,*  
*Attorneys for Petitioners.*

By J. R. WILSON,  
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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No. 81

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LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUKES, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, RILLA McINTYRE AND RUTH  
McINTYRE,

*Petitioners,*

*vs.*

LUTHER THOMPSON AND H. T. PATTON, EXECUTOR OF  
THE ESTATE OF DR. S. A. THOMPSON, DECEASED,

*Respondents*

---

**PETITIONER'S REPLY BRIEF**

---

In this Court's determination as to whether petitioners are entitled to a writ of certiorari so that their case may be decided on its merits, there are three very important issues. All three of these issues relate to whether or not petitioners have been afforded due process of law in connection with their cause of action in this case. Two of these important points have been heretofore relied upon and discussed. They are: (1) whether the Probate Court of Ouachita County, after determining that it did not have jurisdiction in this case, could proceed as it did to make findings of fact calculated to bar petitioners from further action in any court because of the doctrine of *res judicata*, and (2) whether the Probate Court of Ouachita County could properly make findings of fact, although refusing to hear testimony on the case and make such findings of fact in granting the defendant's motion to dismiss.

Another very important point, which has not heretofore been specifically raised, but which may be raised at any time

in court proceedings, is the jurisdiction of the Probate Court in the first instance to order a sale of petitioners' lands. Inasmuch as this is a question of jurisdiction, it may be raised at any time. The Supreme Court of the United States has held time and again that questions of jurisdiction may be raised for the first time before this tribunal. (*Matson Navigation Co. v. United States*, 76 L. Ed. 338.)

Before discussing these issues, it might be well to recall the circumstances out of which this cause arose.

On or about May 1, 1933, William Thompson (negro), resident of Ouachita County, Arkansas, died intestate, leaving surviving him seven children, one of which is the respondent, Luther Thompson, and the others of which are petitioners Lide Thompson, et al. Respondent, Luther Thompson, was appointed administrator of the estate, and *his two bondsmen were Dr. Thompson and Roy Smith*, both of whom were creditors of the decedent. On August 27, 1934, the administrator filed the inventory which may be found on page 41 of the Record. At that time two claims were filed against the estate. Stephens Drug Company filed a claim in the sum of \$54.35, which was allowed in the sum of \$43.48. Dr. S. A. Thompson, *a wealthy and educated white man*, who attended the deceased in his last illness, filed a claim in the sum of \$588.42 to cover services rendered in defendant's last illness. Plaintiffs allege and it has not been denied that Dr. S. A. Thompson himself hired a lawyer to handle the estate and that Dr. Thompson had Luther Thompson appointed administrator for the purpose of taking from these poor and ignorant negroes their property.

The matter of the estate rested after the filing of the inventory as shown on pages 41 and 42 of the Record until sometime in 1936 when Smith Brothers and Company filed a claim against the estate in the sum of \$250.00. The statute of nonclaim had previously barred the claim of

Smith Brothers and Company and the administrator had no right to allow the claim. During the period from 1934 to 1936, it was alleged and not denied that approximately \$250.00 rent was collected from the lands, which, together with the personal property, made a total of \$996.39 worth of personal property in the hands of the administrator, over one-half of which was cash or bank deposits.

Still acting at the suggestion of Dr. Thompson and his attorney, the administrator filed a petition to sell the lands *to pay the debts of the estate*, alleging that such order was necessary to pay the said debts of the estate, and said order was granted and the property was sold thereunder. It should be remembered that the inventory showed sufficient personalty to pay these debts. If the personalty was still available, then there was no jurisdiction for such an order. If the administrator had spent the personal property, then the creditors, as bondsmen, were liable therefor, and there was still no need to sell the lands and no jurisdiction in the Probate Court to order the sale thereof.

We shall now attempt to briefly discuss these three all-important issues in the light of respondents' brief.

## I

**The Probate Court of Ouachita County Could Not, Without Violating the Due Process of Law Clause of the Constitution of the United States, Indicate, in One Breath, That It Did Not Have Jurisdiction in the Case, and, in the Next Breath, Attempt to Make Findings of Fact Calculated to Bar Plaintiffs from Relief in a Court Which Would Have Jurisdiction.**

Respondents say in their brief:

*"The contention that the probate court passed on the merits of the case at the same time holding that it was without jurisdiction is a specious argument. The court*



*never held that it was without jurisdiction of the subject matter, but held that it was without jurisdiction to set aside its former judgment on the showing made by the petitioners in the pleadings which they filed.” (Italics ours.)*

By reference to page 20 of the Transcript of Record, we note that in its findings the Probate Court of Ouachita County stated:

*“There is no doubt, in the mind of the Court, that the Chancery Court not only has jurisdiction in this case, but is the only court in which suit may be filed for the relief sought by the plaintiffs in this action. \* \* \**

*“The Court is of the opinion, and finds, that the probate court in which the case was filed, has no jurisdiction to grant the relief prayed for in plaintiff’s complaint, and the action should be dismissed on that ground. However, there are other questions of fact presented in the pleadings and argued by the parties in their briefs submitted to the court, and no doubt the parties desire a finding on those issues of fact.” (Italics ours.)*

If the court had no jurisdiction, it is well settled that it could not make any valid findings in the case, even by consent of the parties. (*Industrial Addition Association v. Commissioner of Internal Revenue*, 89 L. Ed. 260, Headnote 2.) Its attempt to find the facts by saying “no doubt the parties desire” such findings is an attempt to foreclose rights of these plaintiffs by application of the doctrine of *res judicata*. This contention is not specious as claimed by respondents nor did the court hold that it was without jurisdiction to set aside the judgment on the showing made by petitioners. *It held specifically that the Chancery Court was the only court having the authority to grant them relief prayed for and that under these circumstances it had no authority to make any determination whatever in the case.*

If this writ of certiorari be denied, petitioners will have been denied a trial of their cause of action on its merits as effectively as if the court had refused to allow them to file their case, and they will have thus been denied due process of law.

## II

### **The Determination of Facts Adverse to Those Alleged in Connection With the Granting of Motion to Dismiss**

Plaintiffs brought the present action alleging fraud on the part of the respondents on both the court and plaintiffs and setting out specifically the circumstances of that fraud. Defendants move to dismiss the action on the ground that the court was without jurisdiction, which motion to dismiss was nothing more nor less than a demurrer, and, for the purpose of determination of the motion, it must be assumed that plaintiffs' allegations were true, because the motion to dismiss was ruled on before plaintiffs had an opportunity to present their testimony, and before any testimony was introduced in behalf of defendants. The court, however, in granting the motion to dismiss, made findings of fact which were completely without any evidence whatever before the court, and which were completely adverse to the allegations of the plaintiffs. This was no mistake of law but was, instead, a denial to plaintiffs of a trial and substituting for a trial on its merits the arbitrary findings of fact by the lower court. Such proceedings could not possibly have afforded plaintiffs (petitioners herein) due process of law. This was not merely incorrect findings of fact or incorrect determination of law, but it was, instead, a denial that plaintiffs had any right whatever in the court. *Such denial can only be reasonably explained on the basis of the fact that plaintiffs are poor humble negroes and defendant was a wealthy*

and prominent white man. This Court has held that it will look not merely to the form in cases of this nature, but also to the substance, and when due process is denied petitioners, the mere fact that the *form* of a trial has been afforded will not bar the Supreme Court from insisting that justice be done. (*Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, 56 L. Ed. 863, 868.)

### III

#### **The Jurisdiction of the Court to Sell Petitioners' Lands**

The laws of Arkansas provide that property of a deceased person vest immediately upon his death in his heirs, subject to divestment only on the condition that the property must be sold to pay the debts of the estate. Under these circumstances a Probate Court has no jurisdiction whatever over lands which have passed to the heirs of a deceased person unless it first be shown that the sale is necessary to pay the debts of the estate. The Supreme Court of Arkansas has held that the Probate Court must, in its order of sale, recite facts sufficient to show that it has jurisdiction to sell the lands. (*Crider v. Simmons*, 192 Ark. 1075.) There can be no doubt but that if there is no necessity for the sale of the property in order to pay the debts of the estate the Probate Court does not have jurisdiction of the subject matter, and cannot make any orders whatever concerning the property.

Let us now consider a case which we believe to be very similar in legal principle to the case at bar. This case is *Scott v. McNeal*, 38 L. Ed. 896, 154 U. S. 34. The case involves an action by Scott to recover possession of property in the State of Washington. The facts reveal that Scott was absent from his home for a long period of time and that it was finally assumed that he was dead; that under the statutes of the State of Washington, any person miss-

ing and unaccounted for for a period of seven years may be found to be dead. An administrator was appointed in Scott's estate and the administrator obtained an order from the Probate Court ordering the sale of the lands. The lands were sold to the defendants, who were innocent third parties. Scott returned and sued for the lands and the Probate Court held that its determination of his death was authorized under the state statute and was legally binding and that a sale had thereunder could not be disturbed. The case was appealed to the Supreme Court of Washington which also held that under its statute plaintiff was barred from recovering his lands. On appeal to the Supreme Court of the United States, this Court held that the Probate Court was without jurisdiction in the case and that its order of sale of his lands was therefore not due process of law and that it had authority to intervene so that due process of law could be afforded plaintiff. The court, in so holding, stated:

"At the time of the offer of this evidence, the plaintiff objected to the admission of the proceedings in the probate court, upon the ground that they were absolutely void, because no administration on the estate of a live man could be valid, and the probate court had no jurisdiction to make the orders in question as irrelevant and immaterial. *But the court ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its proceedings were not absolutely void;* and therefore admitted the evidence objected to, and directed a verdict for the defendants, which was returned by the jury and judgment rendered thereon. The plaintiff duly excepted to the rulings and instructions at the trial, and appealed to the Supreme Court of the State.

"In that court, it was argued in his behalf 'that to give effect to the probate proceedings under the circumstance would be to deprive him of his property

without due process of law.' But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. \* \* \*

"The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the probate court of the county of Thurston and territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888.

" \* \* \* 'The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time, and which becomes perfect through prescription; but it was void, because the court was without authority to order it.' 'It is urged on the part of the defendants, that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of succession, it was not for them to look beyond it. *But that is assuming as true that which we know was not true.* The owner was not dead. There was no succession.' And the court added that Chief Justice Marshall, in *Griffith v. Frazier*, 12 U. S. 8 Cranch, 9 (3:471) disposed of that position. *Burns v. Van Loan* (1877) 29 La. Ann. 560, 563. \* \* \*

"The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate; the court saying: 'Our statutes only authorize administration of the estate of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially in rem, and all parties must

be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Section 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before 'said court or in the exercise of its jurisdiction.' Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. \* \* \*

"The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' *These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities.* (Citing cases) And the first one, as said by Chief Justice Waite in *United States v. Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia v. Okley*, 17 U. S. 4 Wheat. 235, 244, *was intended to 'secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'*

"Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, *this Court is no more bound by that court's construction of a statute of the territory or of the state, when the question is, whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state.* In every such case, this Court must decide for itself the true construction of the statute. *No judgment of a court*

*is due process of law, if rendered without jurisdiction in the court, or without notice to the party.*

“The words ‘due process of law’, when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this Court, ‘mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.  
\* \* \*

“Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. (Citing cases) *And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist.* \* \* \*

“The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration. \* \* \*

\* \* \* And by Sections 1493 and 1494, a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth ‘the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased’; and must show that it is necessary to sell real estate ‘to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration.’

“The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void; the receipt of money by the administrator is no



discharge of a debt; and a conveyance of property by the administrator passes no title.

“ \* \* \* But proof under proper pleadings, *even in a collateral suit*, that he was alive at the time of the appointment of the administrator, controls and *overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction, and the administrator no authority; and he is not bound, either by the order appointing the administrator, or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.*

“The defendants did not rely upon any statute of limitations nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, *acting under the orders of a court which had no jurisdiction to appoint him, or to confer any authority upon him, as against the plaintiff.*” (Italics ours)

Under the rule in this case, it is obvious that the Probate Court of Ouachita County, Arkansas, being without jurisdiction to order the lands sold because of the fact that such sale was not needed to pay the debts of the estate, did not afford plaintiffs due process of law and took their lands. *One all-important element for jurisdiction of the subject matter* was absent, i.e., the necessity to sell for the payment of debts. The period of limitation does not enter into this case. Neither does the doctrine of laches interfere here, for in the first place, the proceedings had were in a Probate Court, which is a court of law, not qualified to apply the doctrine of laches, and, in the second place, the doctrine of laches is based on damage to innocent parties. There are no innocent third parties intervening here. The estate of Dr. S. A. Thompson still holds title to the land of petitioners. It is therefore obvious that the doctrine of laches could not be applied in a case such as this.

It cannot, we believe, be said that petitioners had an



opportunity to intercede in the original action. They are not parties thereto and it must be further remembered that they are humble negroes residing in a land in which the white man traditionally has had control of the courts; any complaint by petitioners that this white man was defrauding them would have received very little sympathy from the court at that time.

### Conclusion

Petitioners have, as a precautionary matter, brought an action in the Ouachita Chancery Court in connection with this cause of action. Petitioners will undoubtedly be barred from trying this cause on the basis that the findings of fact of the Ouachita Probate Court were *res judicata* in this matter. If it is so held, then petitioners will, indeed, have been robbed of their land without any opportunity to have their cause tried on its merits. They will have been barred by the findings of the fact of a court having by its own findings no jurisdiction to grant the relief prayed. They will have had their lands taken from them by an unscrupulous white man only to find that they are not to be afforded the right of redress.

Respectfully submitted,

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WILSON AND KIMPEL,  
By J. R. WILSON,  
*Counsel for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CHARLES ELMORE GRIFFIN  
CLERK

No. 81

LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUKES, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, RILLA McINTYRE and RUTH Mc-  
INTYRE

*Petitioners*

vs.

LUTHER THOMPSON, and H. T. PATTON, Executor of  
the Estate of Dr. S. A. Thompson, Deceased

*Respondents*

RESPONDENTS' BRIEF ON PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME COURT  
OF ARKANSAS

*W* J. BRUCE STREETT,  
✓ J. E. GAUGHAN,

Counsel for Respondents



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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**No. 853**

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LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUKES, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, RILLA McINTYRE and RUTH Mc-  
INTYRE

*Petitioners*

*vs.*

LUTHER THOMPSON, and H. T. PATTON, Executor of  
the Estate of Dr. S. A. Thompson, Deceased

*Respondents*

---

**BRIEF IN RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI**

---

**I.**

**THE PETITION FOR WRIT OF CERTIORARI  
SHOULD BE DENIED**

1. The right to review by certiorari does not exist under Section 344, Title 28 USCA (237 Judicial Code, as amended) Paragraph (b), because there was no denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Statutes of Arkansas which governed the pro-

cedure in the Probate Court under which the lands were sold afforded the petitioners full opportunity to be heard and to present their objections to the order of sale, and to appeal if error was committed by the court in making the order.

3. The Statutes of Arkansas afford to petitioners adequate means to have the judgment of the probate court vacated on proper grounds, and petitioners did avail themselves of this procedure; but the State Court held that the grounds for vacating the judgment offered by petitioners were insufficient.

4. In addition to the remedy pursued by petitioners they had a remedy by equitable proceedings in the Chancery Court to set aside the administrator's deed on the ground of fraud.

## II.

### STATE STATUTES INVOLVED

(References are to Pope's Digest of the Statutes of Arkansas.)

#### A. STATUTES PERTAINING TO SALE OF LANDS TO PAY DEBTS

Section 148 Lands are assets in the hands of the Administrator for the payment of debts of the intestate.

Section 149 Provides how application shall be made to the Probate Court for an order to sell lands to pay debts.

Section 151 Relates to the order of sale to be entered by the Court directing the sale.

Section 158 Lands must be appraised.

Section 161 Lands must bring two-thirds of appraised value.

Section 157 Notice of the proposed application for an order to sell must be published in a newspaper.

## B. STATUTES SPECIFYING JURISDICTION OF PROBATE COURTS

Section 2883 Probate Courts have original jurisdiction in matters pertaining to the Estates of deceased persons.

Section 2884 Constitutional Provision. Appeals may be taken from judgments and orders of the probate court to the Circuit Court under such regulations and restrictions as may be prescribed by law. Art. VII, Sec. 35, Const.

Section 2885 Provides the manner in which appeals should be taken to the Circuit Court from orders of the Probate Court — and to the Supreme Court from judgments of the Circuit Court. Any heir, devisee or legatee may appeal.

By Act 3 of the General Assembly of Arkansas for the year 1939, the presiding Chancery Judge was made Judge of the Probate Court instead of the County Judge who had theretofore presided as such judge. By Acts 164 of 1939 and 214 of 1939, provisions were made for appeals from the Probate Court direct to the Supreme Court.



### C. STATUTES WHICH AFFORD REMEDY FOR MODIFYING OR VACATING A JUDGMENT

Section 8246. "The Court in which a judgment or final order has been rendered or made, shall have power after the expiration of the term to vacate or modify such judgment or order;"

Eight grounds are listed including:

"Fourth—For fraud practiced by the successful party in the obtaining of the judgment or order."\*

Section 8248. "Procedure to vacate or modify. The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh and eighth subdivisions of Section 8246 shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint, a summons shall issue and be served, and other proceedings had as in an action by proceedings at law. Id Sec. 573."

Section 8249. "Conditions of relief. A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified all liens

\*This has been held to mean fraud practiced on the court. PARKER v. SIMS, 185 ARK., 1111; MANNING v. MANNING, EXECUTOR, 206 ARK., 425.

and securities obtained under it shall be preserved to the modified judgment. Id Sec. 574."

Section 8250. "Preliminary Proof. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action. Id. Sec. 575."

### III.

#### STATEMENT OF THE CASE

The first complaint was filed on July 21st, 1941. (R. 5) A motion to quash service was filed by the defendants (respondents herein) which was denied. Various orders were entered and settings of the case transpired culminating in a motion to dismiss (R. 13) which was filed by defendant, S. A. Thompson on April 5th, 1946. In passing upon this motion, the court reviewed the entire record of the former proceedings of the court relating to the order of sale which the court had made in 1936. In passing upon the motion to dismiss, the court made written findings, (R. 18) holding that the allegations in the complaint did not set out sufficient facts to show that fraud had been practiced on the court in the procurement of the order of sale, and that the record showed that the proceeding in the probate court relating to the sale appeared to be regular and that plaintiffs were guilty of laches in waiting nearly five years to present their petition to vacate the order of sale. The motion to dismiss was sustained November 23rd, 1946.

On December 5th, 1946, the Court made an order allowing plaintiffs to file amendments to their original plead-

ing. (R. 25) They filed an amended and substituted complaint (R. 25) in response to which defendant renewed his motion to dismiss (R. 31), which motion was sustained and the amended and substituted complaint was dismissed on the same grounds and for the same reasons as the original complaint. (R. 32) From this order the plaintiffs appealed to the Supreme Court of Arkansas, which Court affirmed the order of the lower court. (R. 52).

#### IV.

#### ARGUMENT

The object of petitioners' complaint filed in the probate court was to vacate a judgment of that court which had been made nearly five years before. In Arkansas, the Probate Court is a court of superior jurisdiction having regular terms. *Sewell v. Reed*, 71.SW (2d) 191; 189 Ark., 50; *Branch v. Veterans Administration*, 74 SW (2d) 80, 189 Ark. 662; *Levinson v. Treadway*, 78 SW (2d) 59; 190 Ark. 201; *Young v. Young*, 147 SW (2d) 736; 201 Ark. 984; *Bright v. Johnson*, 152 SW (2d) 540; 202 Ark. 751; *Gocio v. Seamster*, 160 SW (2d) 194, 203 Ark. 937.

After the lapse of the term the court cannot vacate a judgment except pursuant to statutory provisions, one of which is for fraud practiced on the court. *Parker v Sims*, 185 Ark. 1111; 175 SW (2d) 982; *Manning v. Manning, Executor*, 206 Ark. 425.

While the complaint did not strictly meet the statutory requirements, the court treated it as being sufficient and considered it as though it fully met these requirements. In passing upon the sufficiency of the complaint the court re-examined the record of the proceedings by which the lands were sold and the court considered the allegation of fraud set forth in the complaint. From a consideration of all this the court reached the conclusion that the elements of fraud charged in the complaint, if true, considered in connection with the record of the proceedings in the probate court, were not sufficient to justify the court in vacating the decree. The Petitioners were permitted by the court to file an amended and substituted complaint, which the court likewise dismissed in response to defendant's demurrer.

The action in the Probate Court to vacate the former judgment of that court was not the only remedy that petitioners might have pursued. They might have maintained an action in the Chancery Court based on grounds of fraud. The Chancery Court has jurisdiction to cancel a deed given by the Administrator on the ground of fraud. *Crider v. Simmons*, 192 Ark. 1075; *Wilson v. Lester*, 182 Ark., 386.

The remedies pursued by petitioners provided under the statutes of the State and in the courts of the State of Arkansas, afforded them due process of law.

The cases cited by petitioners to support their contention that they have been denied due process of law are not in point and do not fit the facts in this case.

In cases of this kind due process of law requires that a person shall be afforded an opportunity under the laws of the State to protect his property or to assert his rights. This opportunity was available to petitioners.

In the following cases it was held that the procedure authorized by the laws of the State constituted due process.

*Miedreich v. Lauenstein*, 232 U. S. 236; 58 U. S. L ed 584; *American Surety Co. v. Baldwin*, 287 U. S. 156; 77 U. S. L ed 231; 86 A.L.R. 298; *Joseph Paterno v. John A. Lyons, Commissioner*, U. S. Sup. Ct. Fed. Advance Sheet, Vol. 92, No. 17, Page 1035; *Gelfert v. National City Bank of New York*, 313 U. S. 221; 85 U. S. L ed 1299; 133 A. L. R. 1467. *Stadelman v. Miner*, 246 U. S. 544; 62 U. S. L ed 875.

The contention that the probate court passed on the merits of the case at the same time holding that it was without jurisdiction is a specious argument. The court never held that it was without jurisdiction of the subject matter, but held that it was without jurisdiction to set aside its former judgment on the showing made by the petitioners in the pleadings which they filed.

Respectfully submitted,

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